BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	CC Docket No. 95-185

MOTION
TO ACCEPT LATE-FILED COMMENTS
(COMMENTS ATTACHED)

The California Public Utilities Commission (California or CPUC) respectfully submits this motion to Accept Late-Filed Reply Comments in the above docket, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers. The Reply Comments in this proceeding were due on July 17, 2002.

Because of the press of other business, California was unable to get its Reply Comments to the FCC on the due date. Therefore, California asks the FCC to accept these late-filed Reply Comments in the above docket.

Respectfully submitted,

GARY M. COHEN
LIONEL B. WILSON
ELLEN LEVINE
GRETCHEN T. DUMAS

By: /s/ Gretchen T. Dumas

Gretchen T. Dumas

505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-1210
Fax: (415) 703-4432

Attorneys for the
Public Utilities Commission
State Of California

August 8, 2002

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REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

GARY M. COHEN
LIONEL B. WILSON
ELLEN S. LEVINE
GRETCHEN T. DUMAS

Attorneys for the People of the
State of California and the
California Public Utilities Commission

505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-1210
Fax: (415) 703-2262

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SUMMARY

The United States Supreme Court's recent decision in Verizon Communications, Inc., et al., v. FCC , 535 U.S.____ (2000) (hereafter, "*Verizon*"), supports the position of the FCC and the States that the number of Unbundled Network Elements ("UNE") to be made available to competitors should not be limited. The Supreme Court's decision clearly endorsed the intent of the 1996 Telecommunications Act (47 U.S.C. Section 251, et seq) which favors supporting competition by allowing new entrants into the telecommunications marketplace by making it possible for them to operate in that marketplace in a reasonable and nondiscriminatory manner.

By contrast, the D.C. Circuit Court of Appeals decision in USTA v. FCC, (D.C. Circuit) (2002) (hereafter, "*USTA")* remanded the FCC's network unbundling rules (which established a national UNE list and addresses the "necessary and impaired" standard as required by the Telecommunications Act). and remanded and vacated the FCC's Line-Sharing Order, 14 FCC Rcd 20912 (1999). The *USTA* Court found that by ordering Line-Sharing (*i.e.*, the unbundling of the high frequency spectrum of copper loop that enables data CLECs to provide DSL services), the FCC did not appropriately consider the relevance of competition in broadband services coming from cable and to a lesser extent satellite providers. In reaching this decision, the *USTA* Court failed to consider that data CLECs themselves need to use Line-Sharing in order to offer DSL Services.

Therefore, in the instant proceeding the FCC should continue to require Line-Sharing. To do otherwise, would eliminate the necessary level playing field, which in turn could have the effect of limiting the number of competitive choices available to customers. For example**,** without Line-Sharing, there will be no real competitive access to the last mile to the customer for DSL providers using a telephone line. The FCC should maintain its existing unbundling obligations for ILECs and the current competitive obligations on ILECs should not be reduced unless a clear and convincing need is shown. In fact, it may be appropriate to require more, not less, unbundling in order for the FCC to achieve the key goals of the Telecommunications Act, lower prices, greater service choices and innovation in competition.

Moreover, the FCC should allow the States to supplement current unbundling requirements tailored to local market conditions. This flexibility is needed, because data CLECs are in a much weaker position today than they were two years ago. The FCC would harm, rather than promote, competition by restricting the use of UNEs. In addition, the FCC should explicitly consider differences between the states. Different geographical circumstances may dictate different mandates on the ILECs in various states to provide UNEs. For example, in California, there is a great disparity between the availability of DSL broadband services, with the majority of such services provided in urban, not rural areas. To the extent that broadband service is even offered in rural areas, cable modem technology is not widely available, and broadband service is most likely only available from the ILEC. Thus, the only viable competition to ILEC provided-broadband in rural areas in California would be from a data CLEC that relies in large part on the continued regulatory requirements for the incumbent ILEC to offer UNEs. In suburban areas in California, cable modem access does often provide an alternative to the ILEC's DSL service, but it is not ubiquitously available in these areas, and the only viable competition is from data CLECs. Current unbundling requirements should therefore be maintained in all geographic regions in California if significant competition is to ever develop.

Finally, an automatic sunset procedure and supported by the ILECs, would be arbitrary, and would fail to take into account the actual state of development of alternative UNE providers. An automatic trigger would necessarily be based on untested assumptions about the degree of competition that is likely to develop in the local exchange market and the UNE market by the sunset date.

In conclusion, California believes that Line-Sharing must be retained to allow data CLECs to continue to stay in business and thus ensure that competition will exist in all sectors of the marketplace. Therefore, it is premature for the FCC to reduce the ILECs' unbundling obligations.

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REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") hereby file these reply comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC") in the above-captioned proceedings, and, further, file comments as requested by the FCC incorporating the holding of the District of Columbia Court of Appeals Decision in USTA v. FCC, (D.C. Circuit)

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(2002), which concerned the FCC's UNE Remand Order ,15 FCC Rcd 3696 (1999) and Line Sharing Order ,14 FCC Rcd 20912 (1999).

I. COURT CASES

A. The United States Supreme Court's Recent *Verizon* Decision Supports the Position of the FCC and the States That the Number of Unbundled Network Elements to be Made Available to Competitors Should Not Be Limited

On May 13, 2002, the United States Supreme Court, in Verizon Communications, Inc., et al., v. FCC , 535 U.S.____ (2000) (hereafter, "*Verizon*"), put to rest any credible challenge in the future regarding the cost methodology, "TELRIC," that States, along with the FCC, have used to set unbundled network element costs. Additionally, the Court approved the use of combination rules for unbundled network elements (UNE's) to enable competitors to set up combinations of UNE's that may be different than those offered by the incumbent local exchange carrier (ILEC).

The FCC proceeding that is most impacted by Supreme Court's Decision is the FCC's "Triennial Review," the above-captioned CC Docket No. 01-338. In this proceeding, the FCC seeks to determine which unbundled network elements are still necessary, such that the lack of availability of these elements would impair potential competitors' ability to compete.

The *Verizon* decision affects this proceeding for several reasons. First, the *Verizon* Court has found that Congress intended to promote competition by allowing new entrants access to unbundled network elements, and that these entrants might not be able to enter the marketplace. The Court found that incumbents need to

> 'perform the functions necessary'…to combine network elements for the competing carrier on an equal footing with the incumbent when the requesting carrier is unable to combine, … when it would not place incumbent at a disadvantage in operating its own network, and when it would not place any other competing carriers at a competitive disadvantage… This duty is consistent with the Act's goal of competition and nondiscrimination, and imposing it is a sensible way to reach the result the statute requires.
>
> Slip Opinion pg. 68. Finally the court opined that
>
> [t]he 1996 Act sought to bring competition to local-exchange markets, in part by requiring incumbent local-exchange carriers to lease elements of their network at rates they would attract new entrants when it would be more efficient to lease than to rebuild or resell. Slip Opinion pg. 68-69.

The Court also stated that "[t]he Act, however, proceeds on the understanding that incumbent monopolies and contending competitors are unequal…" Slip Opinion pg. 63. Given the above, the *Verizon* Court appears to reject the idea that the availability of unbundled network elements is detrimental to facilities-based competition and should be limited for that reason.

The Supreme Court's *Verizon* decision supports the position taken by a number of parties, including California, that the number of unbundled network elements to be made available to competitors should not be limited. This is because the Supreme Court's decision clearly approved of the intent of the 1996 Telecommunications Act which favors supporting competition by allowing new entrants and making it possible for them to work within the telecommunications market place in a reasonable and nondiscriminatory manner.

B. The D.C. Circuit Of Appeals Decision in *USTA v. FCC* Neglects to Consider That the CLECs Themselves Need to use Line-Sharing in Order to Offer DSL Services; the FCC Should Therefore Continue to Require Line-Sharing

It is with this background that the D.C. Circuit Of Appeals issued an Opinion on May 24, 2002, just nine days after the Supreme Court's *Verizon* decision, in USTA v. FCC, *supra,* which remanded the FCC's network unbundling rules (establishing a national UNE list and discussing the "necessary and impaired" standard as required by the Telecommunications Act, 47 U.S.C. Section 251, et seq.). [1] The *USTA* Court found that the FCC did not adequately justify the necessity of these rules (lack of granularity by geographic market, customer class, and other criteria) or look properly at cost issues in the context of impairment.

The *USTA* Court also the vacated and remanded the FCC's Line-Sharing Order, *supra*. The *USTA* Court found that it agreed with the argument of Petitioners in that case that in ordering Line-Sharing (*i.e.*, the unbundling of the high frequency spectrum of copper loop that enables CLECs to provide DSL

[1] 47 U.S.C. 251 (c) (3) requires that ILECs "unbundle" their network elements, that is, providing them on an individual basis to competitive providers on terms prescribed by the FCC. To guide the FCC in deciding which network elements are to be unbundled, the Act goes on to specify access standards. The Act directs the FCC to consider, at a minimum, whether access to such network elements that are proprietary in nature are necessary; and whether the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer. 47 U.S.C. §251(d) (2).

services), the FCC did not appropriately consider the relevance of competition in broadband services coming from cable and to a lesser extent satellite.

California's major immediate concern with the *USTA* Court ruling is that it neglects to consider that the CLECs themselves need to use Line-Sharing in order to offer DSL services.[2] Thus, while the FCC and other parties seek reconsideration of the *USTA* Court Order, (See Rule 41 of the D.C. Circuit Court of Appeals, Circuit Rules which stays the mandate of the Court until the Order has been reconsidered), California recommends that the FCC continue to require Line-Sharing to allow CLECs to remain in business as the Court case is pending. California takes this position for the following reasons.

1. FCC Compliance With the USTA Order Would Eliminate the Necessary Level Playing Field

Based on the statutory language found in 47 U.S.C. 251 (c) (3), the FCC in its Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) defined the terms "impair" and "necessary" to allow CLECs to use Line-Sharing as a means of doing business. The *USTA* Court Order would have the effect of allowing the ILECS to discontinue providing Line-Sharing to CLECs while the FCC looks at other competitors to ILEC's DSL service, such as cable modem service.

[2] California law requires that Line-Sharing be available to CLECs in California. California Public Utilities Code § 709.7.

Such a result would eliminate the level playing field necessary to encourage real competition in the market for DSL services. In other words, if the FCC rescinds its decision to allow competitors to share the local loop with ILEC affiliates, data CLECs in order to maintain advanced service to its residential customers in California would have to order an additional local loop, if one is available. In addition, a CLEC would have to pay to condition this additional local loop to meet DSL specifications and to request the monopoly voice carrier to install this second local loop. Such requests usually result in installation intervals that are two to three times longer than the installation intervals provided by Pacific's data affiliate. Thus, if Line-Sharing is vacated, the result will be significant additional costs and operational disadvantages for a data CLEC to transport the customer's voice and data traffic out of the central office as opposed to utilizing the existing ILEC's equipment.

2. Without Line-Sharing, There Will Be No Real Competitive Access for DSL Providers to the Last Mile to the Customer on a Shared Basis with the ILEC.

The natural monopoly of the ILECs' wireline services last mile to the customer clearly represents an impairment to competition unless there is competitive access on a shared basis. Without Line-Sharing, the CLECs seeking to provide DSL services will be inhibited from being able to obtain just and reasonable rates on the same terms and conditions that are given to their competitors who are ILEC affiliates. As the FCC has not required cable companies to allow CLEC access to their network, these CLECs are not able to work with the cable business.

Further, 90% of the total numbers of DSL lines in California provided by telecommunications carriers are on Line-Sharing circuits. Moreover, the data affiliates of ILECs already possess over 85-90% of the Line-Sharing market in California. Given that only 10% to 15% of customers choose a non-ILEC residential DSL service, if Line-Sharing is vacated, these customers will effectively have no other choice for high-speed service but a cable modem or wireless provider, if available. However, many Californians have no possible access to such alternative providers of advanced services because such alternative services are offered in only limited areas of the state.

The elimination of Line-Sharing is thus not so much a "parity" issue with cable modem as it is a way to completely prevent any wireline DSL competitor from offering service that could compete with that offered by an ILEC's data affiliate. If this were to come to pass, there would be very little hope in the foreseeable future for another innovative technological boom that would offer competition to the ILECs from DSL providers.

II. REPLY COMMENTS TO TRIENNIAL REVIEW PROCEEDING

A. The FCC Should Maintain its Existing Unbundling Obligations for ILEC's

In its Opening Comments in this proceeding, California urged the FCC not to reduce the unbundling requirements unless a clear and convincing need is shown. In these comments, California stated that it may be appropriate to require more, not less, unbundling. California then went on to say that it is essential that the FCC maintain its existing unbundling obligations for ILECs if the goals of the Telecommunications Act of 1996 of lower prices, greater service choices and innovation in competition are to be fully realized.

In its comments, the Illinois Commission agreed with California's position and stated that removing UNEs from the list and revising unbundling rules at this time would undermine the competitive progress that competitors have achieved to date, and would frustrate the continuing efforts to foster a competitive local exchange market in Illinois.

Similarly, the Missouri Commission noted that since the passage of the Act, it is still clear that competition has not met the market opening expectations of the Act. Therefore, Missouri noted that it is premature to eliminate the unbundling requirements. Others states, such as Indiana, Louisiana, and New York, agreed with these positions in their comments.

B. Competitive Obligations on ILEC's Should Not Be Reduced

Next, California emphasized that investment in new construction is not an end in itself. In its opening comments, SBC put much emphasis on the type of conditions needed to exist before it would invest in new equipment and services. Essentially, SBC would like to exempt any potential network element that would come out of new investment. However, SBC seems to have forgotten that the terms of the Divestiture of the Bell System in the early 1980's, and the replacement of those terms in the Telecommunication Act of 1996, required that while the ILECs control the last mile to the customer, they must share their facilities in an effort to promote a competitive marketplace. Therefore, the FCC should disregard SBC's argument as being disingenuous.[3]

The Illinois Commission, again agreeing with California, stated that the competitive obligations imposed on ILECs should not be reduced in order to encourage deployment of advanced services. It is axiomatic that competition and innovation are complementary. Within the confines of this basic axiom, states and the FCC should encourage SBC and other ILECs to invest in new technologies and to offer more services.

C. States Should be Allowed to Supplement Current Unbundling Requirements

Further, the FCC should continue to allow states to supplement current unbundling requirements tailored to local market conditions. This flexibility is needed because CLECs are in a much weaker position today than they were two years ago. As many as 53 CLECS have gone bankrupt in the country since 2001 and many others have discontinued service. The remaining CLECs have less ready access to capital and cannot afford to take risks. CLECs need access to a

[3] It should be noted that SBC's argument that competitors should not have access to their new network elements is premised on the potential competitive threat from cable modem, which is free from such regulation. However, without Line-Sharing to give a customer access to a CLEC competitor, even a customer with access to a cable modem system is faced with an uncompetitive duopoly, the available ILEC DSL service or cable modem service.

complete offering of UNEs that is financially attractive and available without impediments. The FCC would harm rather than promote competition by restricting the use of UNEs.

In California, ILECs remain the dominant provider of local services to a vast majority of customers, particularly for broadband services. Other state Commissions, such as those of Georgia, Indiana, Louisiana, Michigan, Missouri Pennsylvania, and South Carolina, echo these sentiments in their comments. The Indiana Commission, in particular, noted that market-opening expectations have not been met in their state, as evidenced by low levels of market growth by the new entrants. Indiana goes on to say that any claims of inter-modal local exchange competition must be scrutinized carefully, and any "competition" from ILEC affiliates or subsidiaries must not be counted to obtain a more realistic view of the true competitive threats.

D. Differences Between the States Should Be Taken Into Consideration in the Unbundling Analysis

In its comments, California also noted that geography should be taken into consideration in the unbundling analysis. California notes that in our state, there is a great disparity regarding the availability of DSL broadband services with the majority of services provided in urban, not rural areas. Additionally, there exists a great disparity regarding the availability of DSL service for those who are located greater then 17.5 Kft from the ILEC's central office, due to the limitations of DSL over home-run copper.

To the extent that broadband service is even offered in rural areas, cable modem technology is not widely available, and broadband service most likely is only available from the ILEC. California asserts that the only viable competition would be from a data CLEC that relies in large part on the continued regulatory requirements for the incumbent ILEC to offer UNEs. In suburban areas, cable modem access does often provide an alternative to the ILEC's DSL service, but it is not ubiquitously available in these areas. Again, the only viable competition is from CLECs.

In short, current unbundling requirements should be maintained in all geographic regions in California if significant competition is to ever develop. The Pennsylvania Commission agrees and indicated in its comments that states need flexibility to tailor UNE requirements to their needs and to address state-specific technical, demographic and geographic issues. The vast majority of state commissions filing comments took the same position.

E. An Automatic Sunset Procedure Would Be Arbitrary

Given the concerns by state commissions noted above, California's claim that an automatic sunset procedure would be arbitrary, and would fail to take into account the actual state of development of alternative UNE providers, should be seriously considered by the FCC. An automatic trigger would necessarily be based on untested assumptions about the degree of competition that is likely to develop in the local exchange market and the UNE market by the sunset date. As has been seen so dramatically in the past several years in the telecommunications sphere, as well as in other areas in the economy, taking an action today based on the hoped-for success of future projects can be an unreliable basis to move forward.

III. CONCLUSION

There can be no serious dispute that the state of competition today has not met the expectations of Congress as was contemplated six years ago when the 1996 Telecommunications Act was adopted. The ILECs continue to remain the dominant provider of broadband services in all regions, and continue to retain control over essential bottleneck facilities necessary for non-affiliated carriers to offer competing services.

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As a result, California believes that Line-Sharing must be retained to allow the CLECs to continue to stay in business and thrive as competitors to ILECs. It is premature for the FCC to reduce the ILECs' unbundling obligations.

Respectfully submitted,

GARY M. COHEN
LIONEL B. WILSON
ELLEN S. LEVINE
GRETCHEN DUMAS

By: /s/ GRETCHEN T. DUMAS

GRETCHEN T. DUMAS

Attorneys for the People of the
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505 Van Ness Ave.
San Francisco, CA 94102
Telephone: (415) 703-1210
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